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Nusantara Daya Sdn Bhd v Pentadbir Tanah, Johor Bahru

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-01(A)-553–09 OF 2018
VERNON ONG, SURAYA OTHMAN AND HAS ZANAH MEHAT JJCA
4 FEBRUARY 2020

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Land Law — Acquisition of land — Reference to court — Land Administrator awarded compensation to appellant for acquisition of appellant's land — Compulsory acquisition — Reference under s 38(1) of the Land Acquisition Act 1960 — High Court ordered for compensation to be adjusted — Appellant appealed against decision of High Court — Whether learned judge erred in making 10% deduction to market value — Whether learned judge erred in making separate deductions for 'location', 'access' and 'layer' — Whether learned judge failed to consider development potential — Whether issues raised in this appeal related to decision on compensation or questions of law — Land Acquisition Act 1960 s 38(1)

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The land administrator ('LA') awarded the appellant compensation in the sum of RM16,516,800 for acquisition of the appellant's land. Aggrieved with the award, the appellant filed an application for the LA to refer the matter to the High Court pursuant to s 38(1) of the Land Acquisition Act 1960 ('the Act'). The High Court ordered that the compensation be adjusted from RM16,516,800 to RM19,026,907. Dissatisfied with the decision, the appellant filed the present appeal. The appellant submitted that: (a) the learned judge erred in making a 10% deduction to the market value because the scheduled land was larger in size, and the basis for the deduction being that it would attract lesser potential buyers due to its size ('the first ground'); (b) the deductions of 5% for 'location', a further 10% for 'access' and another deduction of 5% for 'layer' amounted to double counting and bad in law ('the second ground'); and (c) the learned judge erred in finding that the potential development value of the scheduled land had already been factored into the transacted value of JPPH Comparable No 1 ('comparable 1') that had no development potential ('the third ground'). The respondent submitted that all three issues raised by the appellants related to questions of fact and was in essence an appeal to increase the compensation. Section 49 of the Act expressly provided that there shall be no appeal from a decision as to compensation. The issue for determination was whether the three issues raised in the present appeal related to a decision on compensation or questions of law.

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Held, allowing the appeal with costs:

(1) The first ground was not purely related to questions of fact on ground of quantum of compensation. It was clear that the learned judge failed to apply the correct definition of market value. Further, the learned judge had also arrived at a finding that there would be a smaller market for the scheduled land due to its size when it was never an issue at the hearing and without any evidential basis whatsoever. The cumulative effect of the abovementioned was such that it was a decision upon which no reasonable tribunal similarly circumstanced would have arrived at. This was plainly an error of law (see para 13).

(2) With regards to the second ground, 'location', 'access' and 'layer' were similar characteristic of the scheduled land and the separate deductions made thereunder amounted to double-counting that was wrong in law (see para 14).

(3) Based on the available evidence, comparable 1 was incapable of development into a 'high-rise high-density commercial development'. On the other hand, there was evidence to support the finding that there was development potential of the scheduled land as opposed to comparable 1. Article 13 of the Federal Constitution on the fundamental right to property required that there ought to be adequate compensation for the deprivation of property through compulsory acquisition. In this instance, the learned judge did not appear to have fulfilled the requirement to consider the development potential of the scheduled land. The non-consideration was a misdirection in law which could be corrected on appeal. Having considered the totality of the evidence on the record, the court was of the view that an upward adjustment of 25% shall be allowed for potentialities development of the scheduled land (see para 15).

[Bahasa Malaysia summary

Pentadbir Tanah ('PT') telah memberikan pampasan kepada perayu berjumlah RM16,516,800 untuk pengambilan tanah perayu. Terkilan dengan award yang diberikan, perayu memfailkan permohonan agar PT merujuk perkara tersebut kepada Mahkamah Tinggi berdasarkan s 38(1) Akta Pengambilan Tanah 1960 ('Akta'). Mahkamah Tinggi mengarahkan pampasan tersebut diubah dari RM16,516,800 kepada RM19,026,907. Tidak berpuas hati dengan keputusan tersebut, perayu memfailkan rayuan semasa. Perayu berhujah bahawa: (a) hakim yang bijaksana terkhilaf apabila membuat potongan 10% kepada nilai pasaran kerana tanah yang dijadualkan adalah bersaiz lebih besar, dan asas pemotongan tersebut adalah kerana ia akan menarik kurang pembeli yang berpotensi disebabkan oleh saiznya yang besar ('alasan pertama'); (b) potongan 5% untuk 'lokasi', 10% lagi untuk 'akses' dan 5% untuk 'lapisan' terjumlah kepada pemotongan berganda dan bertentangan dengan undang-undang ('alasan kedua'); dan (c) hakim yang bijaksana terkhilaf apabila mendapati bahawa nilai pembangunan berpotensi tanah yang

dijadualkan telah diambilkira di dalam nilai urusniaga JPPH Comparable No 1 ('comparable 1') yang tidak mempunyai potensi pembangunan ('alasan ketiga'). Responden menghujahkan bahawa ketiga-tiga perkara yang dibangkitkan oleh perayu adalah berkaitan dengan soalan-soalan fakta dan pada hakikatnya adalah rayuan untuk menambah pampasan. Seksyen 49 Akta dengan jelas memperuntukkan bahawa tidak ada rayuan daripada keputusan mengenai pampasan. Isu untuk penentuan adalah sama ada tiga isu yang dibangkitkan dalam rayuan semasa berkaitan dengan keputusan mengenai pampasan atau persoalan undang-undang.

Diputuskan, membenarkan rayuan dengan kos:

(1) Alasan pertama bukanlah semata-mata berkaitan dengan persoalan fakta berkaitan jumlah pampasan. Adalah jelas bahawa hakim yang bijaksana gagal menggunapakai definisi nilai pasaran yang betul. Tambahan pula, hakim yang bijaksana juga telah memutuskan bahawa akan wujud pasaran yang lebih kecil bagi tanah yang dijadualkan kerana saiznya sedangkan ia tidak pernah menjadi isu di dalam pendengaran kes dan tidak disokong dengan apa-apa keterangan. Kesan kumulatifnya adalah ia adalah suatu keputusan yang tidak akan dibuat oleh tribunal yang munasabah yang berada dalam situasi yang sama. Ini jelas merupakan kesalahan undang-undang (lihat perenggan 13).

(2) Berhubung dengan alasan kedua, 'lokasi', 'akses' dan 'lapisan' adalah ciri yang sama dari tanah yang dijadualkan dan potongan berasingan yang dibuat di bawahnya terjumlah kepada potongan berganda yang salah di sisi undang-undang ('lihat perenggan 14).

(3) Berdasarkan keterangan yang ada, comparable 1 tidak berpotensi untuk dibangunkan menjadi 'high-rise high-density commercial development'. Di sisi lain, terdapat bukti untuk menyokong dapatan bahawa tanah yang dijadualkan mempunyai potensi pembangunan berbanding dengan comparable 1. Perkara 13 Perlembagaan Persekutuan mengenai hak terhadap harta memperuntukkan supaya ada pampasan yang mencukupi diberikan di atas perlucutan harta melalui pengambilan wajib. Dalam hal ini, hakim yang bijaksana kelihatannya tidak memenuhi syarat untuk mempertimbangkan potensi pembangunan bagi tanah yang dijadualkan. Kegagalan untuk membuat pertimbangan tersebut adalah kesilapan dalam undang-undang yang boleh diperbetulkan melalui rayuan. Setelah mempertimbangkan keseluruhan bukti yang direkodkan, mahkamah berpendapat bahawa pelarasan ke atas sebanyak 25% perlu dibenarkan bagi potensi pembangunan tanah yang dijadualkan (lihat perenggan 15).]

Cases referred to

Aquilina and Carberry v Havering London Borough Council [1992] 66 P&CR 39, CA (refd)
Ashbridge Investments Ltd v Minister of Housing and Local Government [1965] 1 WLR 1320, CA (refd)
Edwards (Inspector of Taxes) v Bairstow [1956] AC 14, HL (refd)
Faraday v Carmarthenshire County Council [2004] EWCA Civ 649, CA (refd)
Lucas and Chesterfield Gas and Water Board, Re [1909] 1 KB 16, CA (refd)
Railtrack plc (in Railway Administration) v Guiness Ltd [2002] EWCA 1431 (refd)
Raja Vyricherla Narayana Gajapatiraju v The Revenue Divisional Officer, Vizagapatam [1939] AC 302 (refd)
Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat & another case [2017] 3 MLJ 561; [2017] 5 CLJ 526, FC (refd)
Steel v Scottish Ministers [2015] SLT (Lands Tr) 81 (refd)
Teguh Kemajuan Sdn Bhd v Pentadbir Tanah Daerah Kota Tinggi; Perbadanan Setiausaha Kerajaan Johor (intervener) [2018] 1 LNS 376, HC (refd)
The Queen v Brown [1867] LR 630 (refd)
Transport for London (formerly London Underground Ltd) v Spirerose Ltd (in administration) [2009] UKHL 44, HL (refd)
Waters and others v Welsh Development Agency [2004] 1 WLR 1304, HL (refd)

Legislation referred to

Federal Constitution art 13
Land Acquisition Act 1960 ss 38, 38(1), 49, 49(1), Form N

Appeal from: Land Reference No JA-15–804 of 2018 (High Court, Johor Bahru)

Clarence Edwin (R Paramanandan with him) (Clarence Edwin Law Offices) for the appellant.
Madihah bt Zainol (Johor Legal State Office) for the respondent.

Vernon Ong JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal against the decision of the High Court on a land reference from the land administrator, Johor Bahru under s 38 of the Land Acquisition Act 1960 ('the LAA 1960'). The appellant's land in question measured 4,464 sqmt in area.

[2] Following the compulsory acquisition of the appellant's land by the state authority in 2017, the land administrator ('LA') awarded the appellant compensation in the sum of RM16,516,800 at the rate of RM3,700 per sqmt.

[3] Dissatisfied with the LA's award, the appellant filed an application in Form N to the LA requiring the LA to refer the matter to the High Court pursuant to s 38(1) of the LAA 1960.

[4] On 9 August 2018, the High Court, assisted by assessors, ordered that the compensation be adjusted from RM16,516,800 to RM19,026,907 as the fair market value to be compensated to the appellant for the acquired land. The appellant being dissatisfied with the High Court's decision has appealed to the Court of Appeal. After hearing of oral submissions of counsel and having perused the written submissions and appeal record, we allowed the appeal with costs. We now set out the reasons for our decision.

THE APPELLANT'S SUBMISSION

[5] Before addressing us on the grounds of the appeal, learned counsel addressed the preliminary issue relating to whether the appeal is limited to issues of fact on ground of quantum of compensation. He submitted that this appeal is premised on the ground that there was no evidence on which the High Court properly directing itself could reach that conclusion of fact. As such, that decision may itself for that reason be wrong in point of law and thus susceptible to an appeal (*Ashbridge Investments Ltd v Minister of Housing and Local Government* [1965] 1 WLR 1320; *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14; *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat & another case* [2017] 3 MLJ 561; [2017] 5 CLJ 526 (FC)).

[6] Learned counsel for the appellant argued that that there was no evidence to support the learned judge's decision. His argument is premised on three main points.

First point — 10% deduction to the market value

[7] The learned judge's erred in making a 10% deduction to the market value because the scheduled land was larger in size, and the basis for the deduction being that it would attract lesser potential buyers due to its size. Firstly, there was no evidence that the size of the scheduled land would have attracted lesser potential buyers. This finding is also contrary to the acquiring authority's own expert report. Secondly, the learned judge's finding is plainly wrong in law because it disregarded the very definition of market value which is 'the estimated amount for which an asset shall exchange on the date of valuation between a willing buyer and a willing seller on an arm's-length transaction after proper marketing wherein the parties had each acted knowledgeably, prudently and without compulsion' (Malaysian valuation standards). Therefore, the learned judge erred because he simply failed to adhere to the valuation concept of a hypothetical sale between a willing buyer

and a willing seller. It was submitted that the correct approach was to consider market value of the land from the perspective that there would be a hypothetical person actively seeking land to fulfil needs which the scheduled land could fulfil. There should be no limitations on the capacity or means of this hypothetical person, which the learned judge was wrong to have imposed (*Raja Vyricherla Narayana Gajapatiraju v The Revenue Divisional Officer, Vizagapatam* [1939] AC 302; *Waters and others v Welsh Development Agency* [2004] 1 WLR 1304 (HL); Barry Denyer-Green, *Compulsory Purchase and Compensation* (10th Ed)). Thirdly, while it may be open to the learned judge to explore the possibility that there would be a smaller market for the scheduled land due to its size, this could not have been undertaken unilaterally by the learned judge without inviting expert evidence and submissions on the point. In arriving at the conclusion without the benefit of evidence and submissions, there was a clear breach of natural justice (Michael Barnes, *The Law of Compulsory Purchase and Compensation*, Hart Publishing (2014)). In order for the learned judge to have arrived at the conclusion that the size of the land would attract lesser potential buyers, there must have been a proper inquiry into this aspect and parties allowed to provide evidence on it. In failing to accord the appellant with that opportunity, there was a clear breach of natural justice (*Aquilina and Carberry v Havering London Borough Council* [1992] 66 P&CR 39; *Faraday v Carmarthenshire County Council* [2004] EWCA Civ 649 (CA)).

Second point — Double counting

[8] The double counting relates to the learned judge's making a deduction of 5% for 'location', a further 10% deduction for 'access' and yet another deduction of 5% for 'layer'. Learned counsel argued that 'location', 'access' and 'layer' are three sides of the same pyramid and that separate deductions for similar if not identical characteristics of the scheduled land is a clear instance of double-counting that was wrong in law (*Railtrack plc (in Railway Administration) v Guiness Ltd* [2002] EWCA 1431). In support of this argument, learned counsel referred to the respondent's own expert report where only one deduction for access was made; no deduction was made for location and there is no mention of any deduction for layer. Further, the learned judge in another case only made a single deduction for 'layer and access' (*Teguh Kemajuan Sdn Bhd v Pentadbir Tanah Daerah Kota Tinggi; Perbadanan Setiausaha Kerajaan Johor (intervener)* [2018] 1 LNS 376). There shall, it is submitted, only a single deduction for 'location', 'access' and 'layer' is permissible in law.

Third point — Potential development value of scheduled land

[9] Learned counsel argued that the learned judge erred in finding that the potential development value of the scheduled land had already been factored into the transacted value of JPPH Comparable No 1 ('comparable 1') that had no development potential. In fact, there are a number of significant differences between the scheduled land and comparable 1. Firstly, comparable 1 had no planning approval or development potential whereas the scheduled land had planning approval granted on 12 August 2005 for development of an 18 storey commercial/office building with a basement for which the building plans were also approved. Secondly, comparable 1 is a much smaller piece of land measuring 943.193 sqmt whereas the scheduled land measures 4,464 sqmt. As such, it was submitted that given the clear development potential of the scheduled land, and the lack of any such equivalent potential for comparable 1, the learned judge in concluding that the potentialities development value of the scheduled land had been factored into the transacted value of comparable 1 simply because both lands were zoned 'commercial' is, a conclusion that upon a view of the facts which could not reasonably be entertained (*Edwards v Bairstow*). The requirement to take into consideration the potential of the land acquired has been stated in a number of cases: *Re Lucas and Chesterfield Gas and Water Board* [1909] 1 KB 16; *The Queen v Brown* [1867] LR 630; *Transport for London (formerly London Underground Ltd) v Spirerose Ltd (in administration)* [2009] UKHL 44; *Steel v Scottish Ministers* [2015] SLT (Lands Tr) 81; *Semenyih Jaya*. In fact, the learned judge in *Teguh Kemajuan Sdn Bhd* had decided that the potentiality of an integrated development ought to be given consideration in view of the scheduled land was zoned as commercial. Therefore, it was submitted that the learned judge's finding is wrong in law, more so in view of the fact that the same learned judge had in an earlier case had given allowance for the development potentiality of a scheduled land that did not have planning approval. Accordingly, an upward adjustment of between 12% to 15% ought to be made to the base value of comparable 1 since it did not have any identical potential for a commercial development as the scheduled land had.

THE RESPONDENT'S SUBMISSION

[10] In their short reply, learned assistant legal adviser argued that all three issues raised by the appellants related to questions of fact and is in essence an appeal to increase the compensation. Section 49 of the LAA 1960 expressly provides that there shall be no appeal from a decision as to compensation. As such, the appeal should be dismissed with costs.

DECISION

[11] The Federal Court in *Semenyih Jaya* has clearly decided that the bar to appeal under sub-s 49(1) of the LAA 1960 is limited to issues of fact on quantum of compensation; and that an aggrieved party has the right of appeal

against the decision of the High Court on questions of law. The preliminary issue for determination is whether the three issues raised in this appeal relates to a decision on compensation or questions of law.

[12] The first issue relates to the 10% deduction to the market value. Having considered the submission of counsel for the appellant, we are inclined to agree that there was simply no evidence to support the learned judge's finding that the size of the scheduled land would have attracted lesser potential buyers. In fact, this finding is also contrary to the acquiring authority's own expert report. It is also an error of law as the learned judge appeared not to have applied the proper meaning of market value when he failed to adhere to the valuation concept of a hypothetical sale between a willing buyer and a willing seller. The authorities cited by counsel in para [7] above support the proposition that the 'willing buyer' is an abstraction, a hypothetical person actively seeking land to fulfil needs which the scheduled land could fulfil. The learned judge erred in law to conclude that there would be lesser potential buyers for the scheduled land due to its size. We accordingly agree with counsel for the appellant that the correct approach was to consider market value of the land from the perspective that there would be a hypothetical person actively seeing land to fulfil needs which the scheduled land could fulfil. According to his written judgment the learned judge considered the possibility that there would be a smaller market for the scheduled land due to its size. However, the learned judge's finding was arrived at without the benefit of any expert evidence or submission of the parties. At any rate, there should have been a proper inquiry into this matter and expert evidence called for before a finding is made. Since the appellant was denied the opportunity to deal with the issue, the appellant was denied procedural fairness in being denied the right to be heard. We also note that the size of the land being the basis for a 'negative factor' was never raised at the hearing; and it was also not a position taken by the respondent. Even if the assessors, in their expert opinion, were of the view that the size of the scheduled land was a negative factor, it was incumbent on them to allow the appellant the opportunity to deal with the issue. As such the learned judge's conclusion is without evidential basis and in our considered view constitutes a clear breach of natural justice.

[13] For the foregoing reasons, we do not think that the first ground relates purely to questions of fact on ground of quantum of compensation. That there was no evidential basis to found the learned judge's conclusions is much clear. It is also clear that the learned judge failed to apply the correct definition of market value. Further, the learned judge had also arrived at a finding that there would be a smaller market for the scheduled land due to its size when it was never an issue at the hearing and without any evidential basis whatsoever. The cumulative effect of the abovementioned is such that it was a decision upon which no reasonable tribunal similarly circumstanced would have arrived at.

That this is an error of law cannot be plainer (*Ashbridge Investments Ltd*; *Edwards v Bairstow*; *Semenyih Jaya*

[14] The second ground on double counting also relates to a question of law — as to whether the deductions of 5% for 'location', a further 10% for 'access' and another deduction of 5% for 'layer' is bad in law. In the first instance, the approach taken by the learned judge appeared to be inconsistent with his earlier decision in *Teguh Kemajuan Sdn Bhd* where he made a single deduction for 'layer and access'. The appellant's argument is also borne out in the respondent's own expert report — where a deduction was only made for 'access' (*jalan masuk*) and no deductions was made for location/surrounding (*lokasi/kaw sekitar*) and there was no mention of any deduction for 'layer' which is basically the same for 'access'. We are inclined to agree with the appellant that 'location', 'access' and 'layer' are similar characteristic of the scheduled land and the separate deductions made thereunder amount to double-counting that is wrong in law.

[15] The third ground relates to the argument that an upward adjustment ought to be made to the base value of comparable 1 since it did not have any identical potential for a commercial development as the scheduled land had. The learned judge did not make any upward adjustment of the base value because he opined that the potentialities development value of the scheduled land had been taken into consideration based on the value RM5,799.44 per sqmt for comparable 1. We think it is significant that comparable 1 (943.194 sqmt) is a much smaller piece of land compared to the scheduled land (4,464 sqmt). The appellant's expert had stated in his rebuttal report that it is not justifiable to compare small sizes to the scheduled land. Further, the evidence before the learned judge was that of an expert stating unequivocally that comparable 1 could not be developed into a 'high-rise high-density commercial development'. The respondent did not advance a contrary position in his expert report. As such, based on the available evidence, comparable 1 was incapable of development into a 'high-rise high-density commercial development'. We also note that planning permission had in fact being granted for the scheduled land and that the building plans have also been approved. As such, there was evidence to support the finding that there was development potential of the scheduled land as opposed to comparable 1. In such situation, it falls on the learned judge to take due and proper consideration of the established facts and come to a conclusion. In proceedings relating to the determining compensation under the LAA 1960, art 13 of the Federal Constitution on the fundamental right to property enjoins that there be adequate compensation for the deprivation of property through compulsory acquisition. In this instance, the learned judge did not appear to have fulfilled the requirement to consider the development potential of the scheduled land. Given the established facts, it was incumbent upon the learned judge to have

recognised the scheduled land's development potential and to have made provision accordingly. The non-consideration is a misdirection in law which can be corrected on appeal. Having considered the totality of the evidence on the record, we are of the view that a upward adjustment of 25% shall be allowed for potentialities development of the scheduled land. In coming to our decision, we have considered the various authorities cited by counsel for the appellant, which authorities reiterate trite and settled principles of law relating to this issue.

CONCLUSION

[16] For the foregoing reasons, we allowed the appeal with costs. We set aside the orders of the High Court relating to 10% deduction for size. We substituted the High Court's deductions for location, access and layer with a single deduction of 10% for all three factors. We also allowed potentialities for development of 25%. Interest at 5% on the increased amount was also awarded from the date of the Form K.

Appeal allowed with costs.

Reported by Dzulqarnain Ab Fatar